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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 132

OLLIE OTTO PRINCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 8–14) is reported at 230 F. 2d 568.

JURISDICTION

The judgment of the Court of Appeals was entered on February 29, 1956 (R. 14). The petition for a writ of certiorari was filed on March 26, 1956, and granted on June 4, 1956 (R. 15; 351 U. S. 962). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether separate sentences could validly be imposed under the Bank Robbery Act [18 U. S. C. 2113 (a)] for entering a bank with intent to rob and for robbery.

2. Whether entry unaccompanied by force but with intent to rob is an offense under the statute.

3. Whether the fact that the entry with intent to rob may not have been accompanied by force results in a merger of the offense of entry with that of robbery.

STATUTES INVOLVED

18 U. S. C. 2113 [1952 ed.], commonly called the Bank Robbery Act, provides in pertinent part as follows:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> (b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank,

or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

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(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

* * * * *

The predecessor statute, the Act of May 18, 1934, ch. 304, Section 2, 48 Stat. 783, as amended by the Act of August 24, 1937, c. 747, 50 Stat. 749, 12 U. S. C. [1946 ed.] 588b and c, reads as follows:

§ 588b:

(a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten

years, or both; or whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

(c) Whoever shall receive, possess, conceal, store, barter, sell, or dispose of any property or money or other thing of value knowing the same to have been taken from a bank in violation of subsection (a) of this section shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

§ 558c:

Whoever, in committing any offense defined in section 558b of this title, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct.

STATEMENT

Following a trial by jury, petitioner was convicted in November 1949 in the United States District Court for the Western District of Texas under a two-count indictment charging that in October 1948 he (1) took $15,764 belonging to a federally-insured bank from an employee of such bank by intimidating said employee and in the course thereof placing the life of such employee in jeopardy by the use of a dangerous weapon, and (2) entered the bank with intent to commit the felony of robbery, in violation of 18 U. S. C. 2113 (a) and (d) (R. 1–2). He was sentenced to consecutive terms of imprisonment of 20 years on count one and 15 years on count two (R. 3).

The present proceedings were initiated in June 1955 by petitioner's motion under Rule 35, F. R. Crim. P., to correct his sentence upon the ground that both counts of the indictment stated only one offense and that the total thirty-five-year sentence imposed under the indictment was in excess of the twenty-five-year maximum sentence permissible under 18 U. S. C. 2113 (R. 5–6). The District Court denied the motion in August 1955 (R. 6). On appeal, the Court of Appeals unanimously affirmed (R. 14).

SUMMARY OF ARGUMENT

I

A. The bank robbery statute (18 U. S. C. 2113), first passed in 1934, and amended in 1937 to include the offenses of burglary and larceny, cannot be interpreted in isolation from the settled course of judicial decision

which long antedated its enactment. By 1937, a number of decisions by this Court had made it clear (as a matter both of statutory construction and double jeopardy) that federal statutes punishing a number of related acts would be construed as punishing "separately each step leading to the consummation of a transaction" as well as the completed transaction itself. *Albrecht* v. *United States,* 273 U. S. 1, 11. This Court so ruled in the *Albrecht* case as to possession and sale of the same liquor at the same time, and in *Burton* v. *United States,* 202 U. S. 344, as to an agreement to receive and receipt of unlawful compensation by a United States Senator. Specifically related to the problems of this case is the decision in *Morgan* v. *Devine,* 237 U. S. 632, holding that forcible entry into a post office with intent to commit larceny and theft of post office property were two separate offenses, separately punishable. All these decisions rest their interpretation of the legislative intent solely upon the language of the statute.

This was the climate of legal thinking with respect to multiple offenses in which this statute was passed. There is nothing in the legislative history of the statute to indicate that, insofor as the instant problem was involved, Congress intended that the statute should be interpreted differently from other federal criminal statutes. As a matter of wording, each successive step is made separately punishable.

B. The purpose and pattern of section 2113 (a), as reflected in its early legislative history, also show that Congress intended that the entry into a bank with intent to commit a robbery and the completed

robbery should be treated as separate and distinct offenses, separately punishable. In 1934, the Attorney General recommended a bill to create a number of new federal offenses dealing with bank crimes, which covered larceny, burglary, and robbery, respectively. Each section defined the elements of the offense it covered and set forth the penalty for its commission. In this form, there can be little doubt that, under the decisions of this Court, the bill would have been interpreted as creating the separate offenses of larceny, burglary and robbery, (with an increased penalty for aggravated robbery) even though the offenses would usually be interrelated.

The final enactment in 1934 created only one offense—that of robbery of federally-insured banks with provision for increased punishment for aggravated robbery. In 1937, Congress, upon the Attorney General's recommendation, amended section 2 (a) of the Bank Robbery Act as enacted in 1934 by adding thereto provisions defining burglary (in its modern statutory form) and larceny. There is nothing, however, to indicate that any one thought that this form of defining the initial offenses of robbery, burglary, and larceny in one section, rather than in separate sections as had originally been proposed in 1934, would have the effect of making one of the defined crimes merge into the other. On the contrary, the language which was used in the recommended draft of the bill, defining burglary as entry with intent to commit "any larceny or other depredation," was evidently taken from section 190 of the Penal Code as to post office offenses which, as noted above, had been held in

Morgan v. *Devine*, 237 U. S. 632, to create an offense which was separate from a completed post office theft, and *a fortiori* from robbery. In addition, the House floor debate on this amendment showed complete agreement concerning the separateness of the offense of burglary. The statute as enacted in 1937 was essentially the same as that proposed by the Attorney General in 1934, defining the crimes which had long been held to be separate offenses—burglary, larceny and robbery.

C. Both the judicial gloss and the language changes of the 1948 revision tend to support the view that under this statute entry with intent to rob and robbery are separate offenses.

On the specific problem involved here, the Fifth and Tenth Circuit Courts of Appeals had squarely held, and the Seventh and Eighth had clearly indicated in dicta, that they regarded entry with intent to rob and robbery as separate offenses. On the other hand, only the Sixth Circuit had held, obliquely, and the Ninth Circuit had at most indicated, even more obliquely, that the offenses merged.

Section 2113 (a) was enacted into its present form by the June 1948 revision. The legislative history indicates that this revision made no substantial change in the statute. Had the revisers intended that the offenses of robbery and entry under the statute should not be distinct and separate offenses, punishable as such, as held by the majority of the Courts of Appeals, they would have changed it accordingly. Their awareness of federal decisions under the Act is indicated by the changes, not here relevant, made in the

Act to conform to this Court's decision in *Jerome* v. *United States,* 318 U. S. 101. Instead, the structural changes to include robbery in one paragraph of section 2113 (a) and entry in another paragraph, with two alternate larceny provisions in separate paragraphs of section 2113 (b), indicated recognition and approval of the majority view that section 2113 (a) created the separate offenses of entry and robbery which were punishable as such. Thus there is nothing in the particular legislative history of the instant statute to indicate that Congress intended that it should be interpreted differently from other federal criminal statutes.

II

Entry into a bank unaccompanied by force but with intent to rob is an offense under section 2113 (a) and does not, as a matter of double jeopardy, merge into the completed robbery. There is a serious problem as to whether petitioner can now raise this problem since the indictment does not characterize the nature of the entry. Such an attack goes to the sufficiency of the evidence at the trial and is not normally cognizable on collateral attack. In the past the rule has been that an indictment which purports to charge a federal offense on its face cannot be challenged collaterally. However, in view of this Court's decision in *Bell* v. *United States,* 349 U. S. 81, it may consider that the failure to characterize the entry in the indictment justifies the assumption, which is the actual fact here, that the entry was not forcible and occurred in the daytime. We therefore discuss the problem on this assumption.

A. The statute itself and its legislative history show that any entry with the required intent is an offense cognizable under section 2113 (a). The statute on its face contains no language limiting its application only to forcible entries. The omission of the word "forcible" must have been deliberate since the 1937 amendment was apparently modeled after section 190 of the former Penal Code which used the words "forcibly break into". The omission was in accord with developing concepts of burglary. Although during the debates on the floor of the House of Representatives, the statute was described as creating the offense of "breaking and entering", there is no indication that this was intended to mean that section 2113 (a) was limited to forcible entries. Moreover, the continuation of the 1937 phraseology in the 1948 revision was an acceptance of the interpretation given by a number of federal courts, without any disagreement, that section 2113 (a) covered entries accomplished without the use of force.

B. An entry unaccompanied by force does not merge into the completed offense of robbery as a matter of the constitutional protection against double jeopardy. If, as a matter of statutory construction, the offenses were intended to be distinct, they cannot be held to have merged with each other, unless by definition they are so inseparable that one necessarily embraces the other. In making this determination, the test which is generally applied is whether one offense requires proof of elements different from those required for the other. Here, the elements of the offense of entry of a bank with intent to rob are different from the elements of the offense of robbery.

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Assault upon the person is no element of the crime of burglary as defined in the statute, but is essential to robbery. Entry into the bank is no element of the crime of robbery. The fact that robbery of bank employees is frequently preceded by entry into the bank is, under the decisions of this Court, not controlling. Entry is less an inevitable part of the offense of robbery than possession is normally a part of sale (*Albrecht* v. *United States,* 273 U. S. 1) or agreement to receive compensation is normally a part of the receipt of compensation (*Burton* v. *United States,* 202 U. S. 344).

ARGUMENT

Although admitting that Congress intended to make burglary of a bank a crime and that common law burglary is a separate crime which does not merge into a subsequent robbery, petitioner argues that Congress, in redefining burglary as entry with intent to commit a felony, did not intend to make such entry a separate crime when followed by a robbery. Petitioner further argues that entry with intent to commit a felony but not accompanied by force is either not a crime under the statute or is a crime which necessarily merges into a subsequent robbery so that a separate sentence may not be imposed for the entry.

It is the government's position that, long before this particular crime was defined, it was a well established principle of federal criminal law that a single statute could proscribe as separate offenses various acts which might often be part of one criminal transaction. In view of this principle, the language

of the statute itself, and judicial decisions under the statute between the date of its original enactment and subsequent revision in the 1948 code, the statute must be held to have created separate crimes of entry and robbery, even though these acts were part of one transaction. The result is that each was separately punishable, the extent of punishment being left to the discretion of the trial judge within the statutory limits. We show further that entry unaccompanied by force but with intent to commit a felony is an offense as defined by the statute. The entry can be held to have merged with the robbery only if the elements thereof are so inseparable that, as a matter of the constitutional protection against double jeopardy, the acts could not be separately punished. The crimes here charged are not, under the settled decisions of this Court, thus inseparable.

I

UNDER ESTABLISHED PRINCIPLES WHICH LONG ANTEDATED THIS STATUTE, 18 U. S. C. 2113 (THE PRESENT BANK ROBBERY STATUTE) MUST BE CONSTRUED AS HAVING CREATED SEPARATE CRIMES OF ENTRY AND ROBBERY

Robbery of federally-insured banks was first made a federal crime in 1934. The provisions creating the crimes of entry into a bank with intent to commit a felony (burglary as defined in the statute) and taking of the bank's property without robbery (larceny) were not enacted until 1937. In attempting to determine the intent of so recent a statute, it is inappropriate to ignore, as petitioner has done, the whole

preceding history of the interpretation of federal criminal statutes. In isolation, the language of this statute, like that of others discussed below, might be deemed inconclusive on the issue of whether Congress intended to punish each offense separately or merely to punish the offense of entry when it did not result in a completed act of larceny or robbery. In the light of principles which had been firmly embedded in federal criminal law by 1937, however, the conclusion seems to us inescapable that the offenses were intended to be separate. To interpret this statute as creating only one offense would require the assumption that Congress was wholly unaware of the course of judicial decision in federal criminal law as to multiple offenses and would in effect overrule a multitude of rulings in this field, affecting many criminal statutes. We therefore discuss first the course of judicial decision before 1937 on the interpretation of federal criminal offenses arising out of one transaction, and then against that background consider the history of this statute at the time of its original enactment and in the 1948 revision of the Criminal Code.

A. BEFORE 1937, WHEN THE BANK ROBBERY ACT WAS AMENDED TO COVER ENTRY, IT WAS FIRMLY ESTABLISHED IN FEDERAL LAW THAT A STATUTE OR STATUTES PROHIBITING SUCCESSIVE STEPS IN WHAT WOULD USUALLY BE ONE CRIMINAL TRANSACTION CREATED SEPARATE OFFENSES, SEPARATELY PUNISHABLE

On the issue discussed in this point—whether Congress intended to make entry with intent to rob a separate offense punishable independently from the punishment for the completed act of robbery—it might

perhaps be sufficient as background to point to the decision of this Court in *Morgan* v. *Devine,* 237 U. S. 632, involving sections 190 and 192 of the former Penal Code (present 18 U. S. C. 1708, 2115; see also as to robbery former section 197 of the Criminal Code, present section 2114), which are so similar in structure to the instant statute that they may well have served as a model for this legislation. Section 190 prohibited theft of post office property, section 192 the forcibly breaking into a post office with intent to commit any larceny,[1] both sections having been originally enacted as part of the Act of June 8, 1872, 17 Stat. 283. This Court held that the forcible entry with intent to steal, and the stealing, were two separate and distinct offenses for which two consecutive sentences could validly be imposed. The Court said (237 U. S. at p. 639): "It being within the competency of Congress to say what shall be offenses against the law, we think the purpose was manifest in these sections to create two offenses." And further (237 U. S. at p. 640): "* * * the test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress."

This result was by no means compelled by the state of decision at the time, despite the holding in *Burton* v.

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[1] The instant statute punishes any entry with intent, not merely a forcible entry. This difference is relevant at most only to the issue of merger discussed in Point II, *infra*, pp. 38–45, but not on the issue of whether separate offenses were created by the prohibition of various steps in one transaction.

United States, 202 U. S. 344, discussed below. The considerations that supported a contrary holding that the burglary merged in the completed theft had been set forth by the Court of Appeals for the Ninth Circuit in *Halligan* v. *Wayne,* 179 Fed. 112 (C. A. 9), certiorari denied, 218 U. S. 680. That holding was called to the attention of the Court in the briefs filed in the *Morgan* case (No. 685, O. T. 1914). And while the *Morgan* decision rests upon the assumed purpose of Congress, neither the Court in its decision, nor either side in its briefs, referred to any evidence of Congressional intent other than that gleaned from the statute itself.

The most significant point is that *Morgan* v. *Devine* was no sport in federal criminal law. It was preceded and has been followed by numerous decisions to the same effect—that where a statute or statutes prohibit the successive steps in what would usually be one criminal transaction, each step is a separate offense on which separate punishment may be imposed even though the transaction was carried through to completion and punishment for the completed offense might also be imposed. Thus, the Court in *Morgan* v. *Devine* cited *Carter* v. *McClaughry,* 183 U. S. 365, an early example of what later became a long line of cases holding that conspiracy to commit an offense and the substantive offense itself are separate and distinct.[2] The Court in *Morgan* also quoted from its prior decision in *Burton* v. *United States,* 202

[2] For a more recent expression of this principle, see *Pinkerton* v. *United States,* 328 U. S. 640, 643–644.

U. S. 344, where it had ruled that separate offenses were committed by a Senator in unlawfully receiving compensation and also agreeing to receive compensation in violation of the same statute. The Court had said in the *Burton* case (202 U. S. at p. 377):

> * * * Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied. Therefore an agreement to receive compensation was made an offense. So the receiving of compensation in violation of the statute, whether pursuant to a previous agreement or not, was made another and separate offense. There is, in our judgment, no escape from this interpretation consistently with the established rule that the intention of the legislature must govern in the interpretation of a statute.

Here again, while the decision rests on the assumed legislative intent, the briefs filed in the case (No. 539, O. T. 1905) reveal no discussion of intent beyond the conclusions to be drawn from the face of the statute. The statute in that case, R. S. 1782, provided in one paragraph for the punishment of a member of Congress who "shall receive or agree to receive any compensation" of the type prohibited.

Morgan v. *Devine* was followed by *Albrecht* v. *United States,* 273 U. S. 1, where, under the National Prohibition Act, the defendants were convicted in groups of two counts of both possession and sale of the same liquor at the same time. The defendants contended that the multiple convictions violated the constitutional provision against double jeopardy in

that, the same liquor being involved in both charges, the offense of sale necessarily included the offense of possession. In rejecting this contention, the Court pointed out that it was possible for a person to cause the delivery of liquor of which he had never had possession, and held (273 U. S. at p. 11):

> There is nothing in the Constitution which prevents Congress from punishing separately each step leading to the consummation of a transaction which it has power to prohibit and punishing also the completed transaction.

While the decision is couched in constitutional terms, it necessarily involves a construction of the statute as well, since the constitutional issue would not be present if the offenses were not deemed separate under the statute. Again, the intention of the legislature to create separate offenses rests on nothing more than the words of the statute (section 3, Title II of the National Prohibition Act, 41 Stat. 308) which in one paragraph provided that no person "shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess" any intoxicating liquor except as authorized.

Indicative of the general acceptance by 1937 of this approach to the interpretation of federal criminal statutes is the fact that in *United States* v. *Raynor*, 302 U. S. 540, decided early in January, 1938, in reviewing for another purpose the history of federal counterfeiting legislation which punished various steps in the operation (such as possession of plates, possession of paper, manufacture and sale of counterfeit money, etc.), this Court spoke in passing of the

offense before it as the "last of seven separate offenses set out in one paragraph." 302 U. S. at p. 548. See, in this connection, *United States* v. *Michener,* 331 U. S. 789, decided in 1947. There, the Court, in a short *per curiam* opinion, reversed a decision (157 F. 2d 616 C. A. 8) which had held that consecutive sentences could not be imposed where one count charged possession of a plate adapted for counterfeiting and a second count charged that, on the same date as that set forth in the first count, the defendant caused a plate to be made.

Also significant as indicating the general legal attitude toward multiple offenses arising from one transaction are the decisions dealing, not with the steps in one transaction, but with the units of crime affected by one act. While these decisions are not as directly in point on the instant problem as the ones discussed above, they do show the prevailing view that multiple offenses would often result from what was essentially one act. On the same day that the Court decided *Morgan* v. *Devine,* discussed *supra,* pp 15–16, it held in *Ebeling* v. *Morgan,* 237 U. S. 625, that the cutting of six mail bags in the course of one transaction constituted six separate crimes. See also *United States* v. *Daugherty,* 269 U. S. 360, 361, holding that unauthorized sales of cocaine to three different persons on different days constituted separate offenses, as against the contention that the several offenses constituted a single continuous act inspired by the same intent; *Blockburger* v. *United States,* 284 U. S. 299, decided in 1932, holding not only that separate sales were separate offenses, but that the sale of narcotics

not from the original stamped package and not in pursuance of a written order were two separate and distinct violations under sections 1 and 2 of the Narcotics Act, even though both offenses grew out of one sale; *Adams* v. *United States,* 281 U. S. 202, 204–205, holding that acquittal for making a false entry in the books of a bank, showing a credit, did not bar prosecution for making a false entry in a report of the condition of the bank showing the same credit. And as to separate offenses under different statutes, see *Gavieres* v. *United States,* 220 U. S. 338, rejecting a claim of double jeopardy in relation to prosecutions for insulting a public official and for disorderly conduct growing out of the same incident.[3]

This then was the climate of legal thinking with respect to multiple offenses in which this statute was passed in 1934 and amended in 1937. As we show below, there is nothing in the history of the statute to indicate that Congress intended that, in relation to the problem here involved, this statute should be interpreted in a manner different from that in which federal criminal statutes were then generally being construed, *i. e.,* to make each successive step separably punishable. Rather, such light as the legislative his-

[3] Subsequent to the enactment of the instant statute, this Court has held that each breach of the statutory duty owed a single employee under the Fair Labor Standards Act does not constitute a separate offense, *United States* v. *Universal Corp.*, 344 U. S. 218, and that simultaneous transportation of two women constitutes a single violation of the Mann Act, *Bell* v. *United States*, 349 U. S. 81. These decisions, like those cited in the above paragraph of the text, relate directly to the units of crime not the specific problem raised here of successive steps in one transaction.

tory throws on the problem indicates the contrary. And to the extent that, by the time the statute was reenacted as part of the 1948 revision of the Code, it had the gloss of judicial interpretation, there is further indication that the legislators intended entry with intent to rob, and the robbery itself, to constitute separate offenses.

B. THE PURPOSE AND PATTERN OF THE BANK ROBBERY ACT, AS REFLECTED IN ITS EARLY LEGISLATIVE HISTORY, SHOW THAT CONGRESS INTENDED THAT THE ENTRY INTO A BANK WITH INTENT TO COMMIT ROBBERY AND THE COMPLETED ROBBERY SHOULD BE TREATED AS SEPARATE AND DISTINCT OFFENSES AND SEPARATELY PUNISHABLE

Prior to 1934, robbery, larceny, burglary, and other cognate offenses directed against banks organized or operating under federal law were punishable only under state law. Federal law protected such banks merely against embezzlement and kindred offenses by officers, directors, agents, and employees (18 U. S. C. 334, 656, 1005). In 1933, other offenses against banks reached such proportions as to give rise to requests from all sections of the country for federal protection against gangsters operating from one state to another, a situation with which local authorities were frequently unable to cope.[4]

In response to this situation, the Attorney General in 1934 recommended a bill (S. 2841, 73d Cong., 2d sess.) to create a number of new federal offenses.[5] Sec-

[4] See H. Rep. 1461, p. 2, and S. Rep. No. 537, 73d Cong., 2d sess.

[5] The text of the bill as passed by the Senate (78 Cong. Rec. 5738) did not differ materially from the Attorney General's draft. The Senate bill is copied in Appendix A, pp. 46–47, *infra*.

tion 1 of the bill defined the term "bank" as including banks organized or operating under federal law, and member banks of the Federal Reserve System. Section 2 made it a felony to take or attempt to take money or property belonging to or in the possession of a bank, either without its consent or with its consent when such consent was induced by fraud. Section 3 penalized breaking into or attempting to break into a bank with intent to commit any felony. Section 4 (a) prohibited the forcible taking or attempted taking, from the person or presence of another, of any money or property belonging to or in the possession of a bank, and subsection (b) provided an increased penalty if, in the commission of the robbery, any person should be assaulted or placed in jeopardy of his life by the use of a dangerous weapon. Section 5 imposed a minimum penalty of ten years' imprisonment and a maximum penalty of death upon any one who, in committing any offense defined in the bill, or in seeking to avoid apprehension, or attempting to escape after arrest, should kill or kidnap any person.

In the form in which the bill was drawn, there can be little doubt that, under the decisions discussed above, it would have been interpreted as creating the separate offenses of burglary, robbery and larceny, with an increased penalty for an aggravated form of robbery, even though the offenses would usually be interrelated. The intent to make the offenses separate was indicated, not only by the fact that each was defined in a separate paragraph, but that each carried its own punishment provision, with the penalty for

larceny and burglary less than for robbery, in either the simple or aggravated form.[6]

The bill drafted by the Attorney General did not become law. It passed the Senate without material change,[7] but the House Judiciary Committee struck out Section 2, punishing larceny, and Section 3, punishing burglary, and the bill was finally enacted without those sections.[8] The statute as it was enacted in

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[6] The Attorney General's statement before the House Judiciary Committee is not enlightening on this problem. He said (H. Rep. No. 1461, 73d Cong., 2d sess., p. 2):

"The bill provides punishment for those who rob, burglarize, or steal from such institutions, or attempt so to do. A heavier penalty is imposed, if in an attempt to commit any such offense any person is assaulted, or his life is put in jeopardy by use of a dangerous weapon. A maximum penalty is imposed on anyone who commits a homicide or kidnaping in the course of such unlawful act."

[7] The bill recommended by the Attorney General was introduced in the Senate on February 21, 1934 (78 Cong. Rec. 2946), was reported favorably by the Judiciary Committee without material amendment (S. Rep. No. 537, 73d Cong., 2d sess.), and passed the Senate without debate (78 Cong. Rec. 5738).

[8] The House Judiciary Committee, without explanation, struck out Sections 2 and 3 and renumbered Sections 4, 5, and 6 as Sections 2, 3, and 4, respectively (H. Rep. No. 1461, 73d Cong., 2d sess., p. 1). It also recommended an amendment making the death penalty provided by Section 5 of the Senate bill discretionary with the jury (*ibid*). The bill as thus amended passed the House after only meager discussion which sheds no light on the reasons for the committee's action (78 Cong. Rec. 8132–8133). The Senate disagreed with the House amendments and requested a conference (*id.*, 8264). The House agreed to a conference but insisted on its amendments (*id.*, 8322). The committee of conference recommended that the House amendments stand (H. Rep. No. 1598, 73d Cong., 2d sess.; 78 Cong. Rec. 8776), and the bill was finally enacted in that form (78 Cong. Rec. 8775, 8776, 8778, 8856, 8857). The bill became the Act of May 18, 1934, c. 304, 48 Stat. 783.

1934 is set out in Appendix B, *infra,* pp. 47–48. The legislative history throws no light upon the reasons for the changes but it has been suggested that they were made to confine the bill to situations in which the need to supplement local law enforcement had become imperative.[9]

Between 1934 and 1937, experience proved that the elimination of the larceny and burglary sections had been unfortunate. On March 17, 1937, Attorney General Cummings submitted to the Speaker of the House a draft of a bill to amend Section 2 (a) of the 1934 Act so as to include within its prohibitions the crimes of burglary (involved here) and larceny. H. Rep. No. 732, 75th Cong., 1st sess., Appendix C, *infra,* pp. 49–51.

Evidently because of the form in which the statute then read, with Section 2 (a) defining the offense of robbery, and Sections 2 (b) and 3 providing for increased punishment for the aggravated form of the offense (see fn. 8, *supra,* p. 23, Appendix B, *infra,* pp. 47–48, 48 Stat. 783), the proposal was to amend Section 2 (a) to add, after the definition of robbery, the definitions of burglary and larceny. Thus it was proposed to have the definition part of Section 2 (a) read:

> Whoever, by force and violence, or by putting in fear, feloniously takes, or attempts to take,

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[9] In 1 *Law and Contemporary Problems* (1934) 445, 448–449, the objections to Sections 2 and 3 of the Senate bill were attributed to Representative Sumners, the chairman of the House Judiciary Committee, who, it is said, "sought throughout the session to confine extensions of federal power to those situations where the need to supplement state and local law enforcing agencies had become imperative."

> from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any larceny or other depredation; or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, * * *.

There is nothing, however, to indicate that anyone thought this form of defining the initial offenses of robbery, burglary, and larceny in one section, rather than in separate sections as had originally been proposed in 1934, would have the effect of making one of the defined crimes merge in the other. (As noted *supra* at pp. 16–17 the separate offenses of receiving and agreeing to receive compensation involved in *Burton* v. *United States*, 202 U. S. 344, were defined in one paragraph.) The language defining burglary as entry with intent to commit "any larceny or other depredation" was evidently taken from section 190 of the Penal Code,[10] as to post office offenses which, as noted

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[10] Section 190 had provided:

"Whoever shall forcibly break into or attempt to break into any post office, or any building used in whole or in part as a post office, with intent to commit in such post office, or building, or part thereof, so used, any larceny or other depredation, shall be fined * * *." But the Attorney General's proposal with

supra at pp. 15–16, had been held in *Morgan* v. *Devine*, 237 U. S. 632 to create an offense which was separate from a completed post office theft, and *a fortiori* from a completed robbery.

The amendment recommended by the Attorney General was introduced in the House by Representative Sumners (H. R. 5900, 75th Cong., 1st sess., 81 Cong. Rec. 2731) and was referred to the Committee on the Judiciary. That committee amended the clause defining the intent in burglary to read "any felony or larceny" instead of "any larceny or other depredation" (H. Rep. No. 732, 75th Cong., 1st sess.; Appendix C, *infra*, pp. 49–51).[11] No other changes were made in committee. An amendment to the larceny provision was subsequently offered on the floor of the House to distinguish between grand and petit larceny in response to Representative Wolcott's objection that the bill "puts simple larceny on the same plane as robbery and breaking and entering in an attempt to commit larceny. It seems to me a distinction

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respect to the Bank Robbery amendment departed from Section 190 in that it made any entry with intent to commit larceny, rather than merely forcible entry, a crime. See *infra*, pp. 39–42.

[11] The reason for changing the phrase "any larceny or other depredation" to "any felony or larceny" does not appear in either the committee reports or the Congressional Record. A reasonable explanation is that the proposed draft was too harsh in punishing as burglary an entry accomplished without the use of force with intent to commit any "depredation" (see pp. 24–25, *supra*), and that for this reason the House Committee modified it by substituting a familiar modern definition of burglary. Moreover, the committee probably wished to avoid possible difficulties in interpretation by the use of the classic and more familiar definition of burglary as entering with intent to commit a felony. See p. 40 *infra*.

should be made between simple larceny within the building and robbery * * *":

> Mr. RANKIN. How are you going to tell what a thief is going to do when he gets into a bank? If a man breaks into a house or bank he will kill anyone in it to carry out his purpose.
>
> Mr. WOLCOTT. If the gentleman will read the bill and report, he will see that it not only punishes for robbery, which is putting in fear, and breaking and entering, but the larceny of anything within the bank, whether the man is there lawfully or not. If a man should go into a bank to make a deposit and pick up a pencil and walk out with it he would be on the same plane, according to this bill, as a man who deliberately broke in during the nighttime and committed larceny. I know the gentleman does not agree with that.
>
> Mr. RANKIN. I do not, but if a man breaks into a house he is going to commit a crime.
>
> Mr. WOLCOTT. There is no question about that. Breaking and entering is a crime in and of itself. [81 Cong. Rec. 4656]

Thereafter, the larceny provision was amended to distinguish between larcenies of property of a value exceeding $50 and larcenies of property of lesser value. This satisfied the objection raised by Mr. Wolcott (81 Cong. Rec. 5376–5377).

It is thus clear that Mr. Wolcott's objection was to the severity of the punishment imposed by the bill, as introduced, for petit larcenies unaccompanied by burglary. There was no controversy—in fact, there was complete agreement—concerning the separateness of the offense of burglary, even though in the discussion

quoted above no accurate note was taken of the fact that burglary had been defined to include any entry with intent to commit a felony, rather than only a forcible one. Both amendments were adopted and, as thus amended, the bill passed the House (*Id.*, 5377). In the Senate, the Judiciary Committee merely adopted the House Committee's report (S. Rep. No. 1259, 75th Cong., 1st sess.) and the bill was passed without further change (81 Cong. Rec. 9331). It became the Act of August 24, 1937, c. 747, 50 Stat. 749.

The legislative history thus does not support petitioner's interpretation of the statute as creating only one offense where a completed robbery occurs. The statute as enacted in 1937 was essentially the same as that proposed by the Attorney General in 1934, defining the crimes which had long been held to be separate offenses—burglary,[12] larceny, and robbery. It differed from the original proposal in that greater punishment was imposed if in committing any such offense life was put in jeopardy by use of a dangerous weapon, whereas in the original draft only aggravated robbery was subject to the increased punishment. But that difference does not go to the essential point here, that the entry and the robbery are separate offenses.

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[12] Petitioner concedes that he "is acutely aware of the fact that the crime of burglary *per se* does not necessarily merge into the culminated act" (Pet., p. 23).

C. THE JUDICIAL GLOSS WHICH HAD BEEN PLACED ON THE STATUTE BEFORE ITS REENACTMENT, AS WELL AS THE FORM OF ITS REENACTMENT IN THE 1948 REVISION OF THE CRIMINAL CODE, FURTHER SUPPORT THE VIEW THAT ENTRY WITH INTENT TO ROB AND ROBBERY ARE SEPARATE OFFENSES.

By the time the statute was reenacted in the 1948 revision of the Criminal Code, it had acquired considerable judicial gloss, which is reflected in the slight modifications made by the revisions. Both the gloss and the language changes tend to support the view that under this statute entry with intent to rob and the robbery are separate offenses.

In the period from 1937 to 1948, although there were not many decisions by this Court on multiple offenses arising from one transaction, they continued to reflect the settled interpretation of statutes as separately punishing the steps in one completed transaction. Thus, *Korematsu* v. *United States,* 323 U. S. 214, 222, noted that administrative orders regarding "separate steps in a complete evacuation program" imposed distinct duties and that disobedience of any one would have constituted a separate offense. The Court held in *American Tobacco Co.* v. *United States,* 328 U. S. 781, 787, that conspiracy in restraint of trade and a conspiracy to monopolize under Sections 1 and 2 of the Sherman Act, were separate offenses. And, as noted above (*supra,* p. 19), in *United States* v. *Michener,* 331 U. S. 789, it summarily reversed a holding that possession of a plate for counterfeiting and causing the plate to be manufactured constituted only one offense.

So ingrained in the thinking of federal prosecutors and federal district judges was the concept of separate punishment for separate steps of an offense that many of them did not realize, what the language of the statute clearly indicated, that the punishment provision for placing life in jeopardy in Section 2 (b) (12 U. S. C. (1946 ed.) 588b (b)) was intended merely to provide increased punishment for the aggravated form of the offenses defined in Section 2 (a) (whether before or after the 1937 amendment), and was not the definition of a separate offense. See *Holiday* v. *Johnston,* 313 U. S. 342. The resentencing of many defendants who had been given consecutive sentences, both for the robbery itself and for the aggravated form of the offense, became necessary. *E. g., Ward* v. *United States,* 183 F. 2d 270 (C. A. 10); *Gant* v. *United States,* 161 F. 2d 793 (C. A. 5); *O'Keith* v. *United States,* 158 F. 2d 591 (C. A. 5); *Crum* v. *United States,* 151 F. 2d 510 (C. A. 9); *Miller* v. *United States,* 147 F. 2d 372 (C. A. 2); *Barkdoll* v. *United States,* 147 F. 2d 617 (C. A. 9); *Wilson* v. *United States,* 145 F. 2d 734 (C. A. 9); *Vautrot* v. *United States,* 144 F. 2d 740 (C. A. 8); *McDonald* v. *Moinet,* 139 F. 2d 939 (C. A. 6), certiorari denied, 322 U. S. 730; *Lockhart* v. *United States,* 136 F. 2d 122 (C. A. 6); *Holbrook* v. *United States,* 136 F. 2d 649 (C. A. 8); *Dimenza* v. *Johnston,* 130 F. 2d 465 (C. A. 9); *Durrett* v. *United States,* 107 F. 2d 438 (C. A. 5). In the process of correcting improper sentences, most of the Courts of Appeals which dealt with the question carefully distinguished the problem

of the punishment for the aggravated form of the offense, as provided in Section 2 (b), from the problem of the separateness of the crimes of burglary, robbery, and larceny, as defined in Section 2 (a). They held, in accordance with the settled principles discussed above, that, while Section 2 (b) provided only for increased punishment, Section 2 (a) defined four distinct crimes—robbery, burglary, grand and petit larceny.

In *Wells* v. *United States,* 124 F. 2d 334 (C. A. 5), certiorari denied, 316 U. S. 661 (No. 925, O. T. 1941), the defendant had pleaded guilty to an indictment in four counts charging violations of the Bank Robbery Act, as amended in 12 U. S. C. (1946 ed.) 588b. Counts 1 and 4 charged robbery of a bank by force and entering the bank with intent to commit a felony; counts 2 and 3, assault and the placing of life in jeopardy in the course of committing the robbery. Wells had originally been given consecutive sentences of 20, 25, 25 and 20 years, respectively, on each count. The Court of Appeals held, in a proceeding to correct sentence, that counts 1, 2 and 3 charged only one offense, *i. e.,* robbery of a bank under aggravated circumstances, for which the maximum sentence was twenty-five years. It also ruled, however, that the charge in count 4, entering a bank with intent to commit a felony, was a separate offense from the robbery charged in the other counts, with the result that the separate sentence of 20 years on that count was valid. 124 F. 2d 334. A petition for certiorari by Wells

attacking that aspect of the decision was denied by this Court, 316 U. S. 661.[13]

The Tenth Circuit, in *Rawls* v. *United States,* 162 F. 2d 798, certiorari denied, 332 U. S. 781,[14] where the issue raised was identical to that involved here, and in dicta in *Ward* v. *United States,* 183 F. 2d 270, and in *Holbrook* v. *Hunter,* 149 F. 2d 230, also ruled that the entry and the robbery were separate. The Eighth Circuit in dictum in *Audett* v. *United States,* 132 F. 2d 528, certiorari denied, *sub nom. Audett* v. *Johnston,* 323 U. S. 743, and the Seventh Circuit, also in dictum, in *Steffler* v. *United States,* 143 F. 2d 772, certiorari denied, 323 U. S. 746, agreed with the Fifth Circuit on the issue raised there. The *Steffler* and *Audett* cases presented simply the

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[13] That ruling has been adhered to by the Fifth Circuit in other proceedings by Wells (158 F. 2d 833, certiorari denied, 331 U. S. 852; 210 F. 2d 112) and in *McNealy* v. *United States*, 164 F. 2d 600. See also its prior decision in *Durrett* v. *United States*, 107 F. 2d 438. In *Heflin* v. *United States*, 223 F. 2d 371 (C. A. 5), which was decided after the 1948 revision, there was a sentence for the aggravated form of robbery and separate consecutive sentences for the lesser form of robbery, and for larceny. The government's confession of error failed to make the distinction that, while the lesser form of the offense is included in the aggravated form, larceny and robbery are separate. In accepting the government's confession of error in *Heflin*, *supra*, at p. 376, the Fifth Circuit, contrary to its earlier decisions, said that 18 U. S. C. 2113 (a), (b) and (d) have "been construed as not creating separate offenses, but only as creating different maximum punishments for a single offense depending on the existence of aggravating circumstances" and held that only one sentence should have been imposed. But the court below in the instant case (R. 13–14) explained its *Heflin* decision as being based on the government's concession and said that it did "not wish that case to stand as authority for the view that in this respect the sentence was illegal".

[14] The *Rawls* petition for certiorari was denied as out of time. No. 61 Misc., O. T. 1947.

question of whether the indictments properly charged the offense of entering a bank with intent to commit a felony under the Bank Robbery Act, and did not raise the question of whether the court could punish separately for the commission of the entry where the defendant at the same time was convicted for other criminal acts under the Act. But in the opinions in *Steffler* and *Audett, supra,* the Seventh and Eighth Circuits said that 12 U. S. C. (1946 ed.) 588b (a) defined taking and entering as separate and distinct offenses. Cf. *Gebhart* v. *United States,* 163 F. 2d 962, 963, and *Hewitt* v. *United States,* 110 F. 2d 1, 11, certiorari denied, 310 U. S. 641, where the Eighth Circuit said in cases involving robbery and aggravated robbery, for which (as already discussed above) separate sentences cannot be imposed, that one transaction results in only one offense under the Bank Robbery Act.

The only ruling to the contrary on the particular problem involved here, before enactment of the 1948 revision, is that of the Sixth Circuit in *Simunov* v. *United States,* 162 F. 2d 314, where the indictment under the predecessor statute, 12 U. S. C. (1946 ed.) 588b, charged Simunov in four counts with (1) entry, (2) theft, (3) putting a bank officer's life in jeopardy by the use of a dangerous weapon, and (4) kidnapping. Upon conviction, the judge sentenced him to a blanket sentence of 65 years, and added "25 years for kidnapping." In a motion to vacate, Simunov urged that, since he had been sentenced to 25 years for kidnapping, the court was without power to add another 40 years under the first three counts because

these counts merged into the fourth kidnapping count. The government contended that the convicting court intended to sentence Simunov to a term of 65 years of which 25 years constituted the kidnapping sentence. The court rejected the government's contention and said that "without the element of kidnapping the court could not have sentenced the defendant to a term of 40 years", implying apparently that defendant could not properly be sentenced under counts 1, 2 and 3, since the crimes in those counts became merged with the offense under the count 4. Stating (at p. 315) that "It is now settled that the statute dealing with the offense of bank robbery creates but a single offense with various degrees of aggravation permitting sentences of increasing severity", the court indicated that the defendant's sentence could not exceed 25 years, and reversed and remanded. While the particular issue involved here was not delineated in that case and was obscured by the ambiguity of the sentence, the government had argued that separate sentences could be imposed for the entry and for the combined theft and putting life in jeopardy. The court, in ruling that the defendant could not have been sentenced to 40 years under the first three counts, in effect decided the problem involved here in a way contrary to the view of the court below. The *Simunov* decision was reaffirmed by the Sixth Circuit in *Price* v. *United States,* 193 F. 2d 523, which related to a co-defendant of Simunov but where a sentence for entry was not involved.

As for the Ninth Circuit, the court below, citing *Barkdoll* v. *United States,* 147 F. 2d 617 (C. A. 9),

stated (R. 11) that "the Ninth Circuit in a clear dictum has indicated that it is in accord with this [the *Simunov*] view." That court said in *Barkdoll, supra,* at p. 617: "This Court has held that Section 588b defines one crime, aggravated or not aggravated. Only one sentence can be imposed," and cited its earlier decisions in *Dimenza* v. *Johnston, supra,* and *Wilson* v. *United States, supra.* But *Dimenza* and *Wilson, supra,* involved the distinction between robbery and aggravated robbery and, as shown above, all courts agree that only one sentence can be imposed for the aggravated offense. Although it is not completely clear from the opinion what was involved in *Barkdoll,* it appears that as in *Wilson* and *Dimenza, supra,* robbery and aggravated robbery were charged in two of the counts on which consecutive sentences were imposed.

Thus, before the 1948 revision, two circuits had squarely held, and two others had clearly indicated, that they regarded entry with intent to rob and robbery as separate offenses, while only one circuit held, obliquely, and another had at most indicated, even more obliquely,[15] that the offense merged.

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[15] More recently, after a District Court had held in *Wells* v. *Swope,* 121 F. Supp. 718, as to the same Wells involved in the Fifth Circuit decisions discussed *supra,* pp. 31–32, that consecutive sentences could not properly have been imposed for the entry and the robbery, the Ninth Circuit in reversing on jurisdictional grounds said: "Although it well may be that the offense charged in count four merged into that charged in count three, and [sic] the district court was without jurisdiction to grant the relief requested * * *." *Madigan* v. *Wells,* 224 F. 2d 577, 578 (C. A. 9), certiorari denied, 351 U. S. 911.

In the revision under the Act of June 25, 1948, c. 645, section 1, 62 Stat. 796, Section 2113 was enacted in the form quoted *supra,* pp. 2–4. The Appendix to House Report No. 304, 80th Cong., 1st sess., p. 135, states that the 1948 revision principally consolidated 12 U. S. C. (1940 ed.) 588a, 588b and 588c and that no substantial changes were made in the statute itself. However, it was noted that the use of the word "felony" under the 1937 amendment caused confusion and accordingly Congress changed the Bank Robbery Act, in the 1948 codification, to conform with this Court's decision in *Jerome* v. *United States,* 318 U. S. 101, that the word "felony" as used in 18 U. S. C. 2113 (a) covered only federal and excluded state felonies. This awareness, on the part of the revisers, of federal decisions under the Act suggests that if they had intended that the offenses of robbery and entry under the Bank Robbery Act should not be distinct and separate offenses punishable as such, they would have changed the Act accordingly. Instead, the structural change to include robbery in one paragraph of Section 2113 (a) and entry in another paragraph, and the separate statement of two alternative larceny offenses in paragraph (b), indicated recognition of the majority of the decisions that Section 2113 (a) covered robbery and entry as two separate and distinct offenses which were separately punishable. Moreover, the statute provides in subdivsion (d), *supra,* p. 3, that whoever "in committing, or in attempting to commit, *any* offense defined in subsections (a) and (b) of this section, assaults any person", shall be given the heavier punishment (emphasis added). The use of *any* of-

fense in this context itself suggests that each definition in subsections (a) and (b) relates to a distinct offense, any one of which may be committed in aggravated form.

The problem raised by petitioner as to how the punishment provision for aggravated offenses can be applied if entry and robbery are considered separate offenses is thus clearly answered by the revision, as we think it was also by the 1937 amendment. It is possible for life to be put in jeopardy in making the entry, as well as later in taking money from a person. In this event two aggravated offenses have been committed. The fact that the provision prescribing punishment for aggravated offenses may be said to merge with the provision prohibiting the offense so committed does not mean that separate offenses are themselves merged because both are aggravated.[16]

It is also possible to make an entry without putting life in jeopardy and then place life in jeopardy in the robbery—committing two offenses, one of which is aggravated. The provision for punishment of aggravated offenses thus in no way affects the interpreta-

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[16] Cf. *Casebeer* v. *United States*, 87 F. 2d 668 (C. A. 10), certiorari denied *Casebeer* v. *Hudspeth*, 316 U. S. 683 (aggravated robbery and kidnapping two distinct offenses.) In *Clark* v. *United States*, 184 F. 2d 952 (C. A. 10), certiorari denied, 340 U. S. 955, the Tenth Circuit described the robbery, held to state an offense separate and distinct from the kidnapping, as being aggravated, but it appears that only a simple bank robbery had been charged. Brief in Opposition, p. 2, No. 260 Misc., O. T. 1950. See also *Gilmore* v. *United States*, 124 F. 2d 537 (C. A. 10), certiorari denied, 316 U. S. 661 (aggravated robbery and killing in attempt to escape custody separate offenses).

tion of this statute as prohibiting and punishing each step separately, *i. e.*, the entry with intent to rob and the robbery.

In sum, the government submits that the Bank Robbery Act should be construed in the same manner in which federal criminal statutes had been interpreted for many years preceding its enactment and revision. That is the manner in which the cognate post office statute had been interpreted by this Court in *Morgan* v. *Devine*, 237 U. S. 632. There is nothing to indicate that Congress intended any different method of interpretation as to this statute.

II

ENTRY UNACCOMPANIED BY FORCE BUT WITH INTENT TO ROB IS AN OFFENSE UNDER THE STATUTE WHICH DOES NOT, AS A MATTER OF DOUBLE JEOPARDY, MERGE INTO THE COMPLETED ROBBERY

Insofar as petitioner bases his argument on the nature of the entry in this case, there is a serious problem as to whether the issue can be raised at this time. The indictment charged merely entry with intent to rob, without characterizing the nature of the entry. If only forcible entries are criminal, whether entry was accomplished by petitioner without the use of force goes to the sufficiency of the evidence at the trial, a matter not normally cognizable on collateral attack. *Sunal* v. *Large*, 332 U. S. 174. The rule has been that, where an indictment on its face purports to charge a federal offense, it cannot be challenged unless it appears on the face that no federal offense

could possibly be committed. See *Kelly* v. *Johnston,* 128 F. 2d 793 (C. A. 9), certiorari denied, 317 U. S. 699, where the indictment was challenged in a collateral attack as being fatally defective on the ground that it charged robbery of mail matter (then 197 of the Criminal Code, now 18 U. S. C. 2114) and there was proof at the habeas corpus hearing that what was taken was not "mail matter"; the court held that the issue could not be raised on collateral attack.

However, in *Bell* v. *United States,* 349 U. S. 81, supra p. 20 fn. 3, where the indictment in two counts alleged the same facts as to the transportation of two different women, the Court assumed the undenied fact that there was only one transportation and decided the case on that basis. The Court may also consider that, in this case, the failure to characterize the entry justifies the assumption (supported by the supplemental record filed by petitioner) that the entry was unaccompanied by force and occurred in the daytime. We therefore discuss the problem on this assumption.

A. THE STATUTE ITSELF AND ITS LEGISLATIVE HISTORY MAKE IT CLEAR THAT ANY ENTRY WITH THE REQUISITE INTENT IS A COGNIZABLE OFFENSE UNDER 18 U. S. C. 2113 (a)

The statute on its face has no language limiting its application only to forcible entries. It punishes anyone who "enters or attempts to enter" any of the specified institutions "with intent to commit * * * any felony affecting such bank * * *".

As shown by the legislative history discussed *supra,* pp. 25–26, fn. 10, the omission of a provision for breaking and entering, or for forcible entry, must have been

deliberate. The draft of the act submitted in 1934 employed the usual definition of burglary as a breaking into with intent. See Appendix A, *infra,* pp. 46–47. The 1937 amendment submitted by the Attorney General was evidently modeled on Section 190 of the Penal Code which used the words "forcibly break into" any post office. Thus, there were sufficient models for a correct statement of the usual definition of burglary if that had been the intent of the legislation. The omission of the word "forcibly" must therefore have been specifically designed to cover any entry with intent to commit a felony in order to make sure that one who entered a bank with the requisite intent would be punished, even if he entered without using force and in the daytime. This was in line with developing concepts of burglary, for by that time a number of states had by statute eliminated the necessity for a breaking, and had defined burglary to include any entry with intent to commit a felony. See, *e. g.,* § 459, Penal Code of California, Deering (1937); Miller, *Criminal Law,* (1934) p. 339; *State* v. *Petit,* 32 Wash. 129, 72 P. 1021; *People* v. *Webber,* 138 Cal. 145, 70 P. 1089.

It is true that, during the debates on the floor of the House on the 1937 amendment, Congressman Wolcott spoke about the statute as creating the offense of "breaking and entering", see *supra,* pp. 26–27. But as shown in the legislative history of the amendment under Point I of this brief (*supra,* pp. 21–28), that discussion was concerned principally with the larceny provisions of the amendment, and there is no indica-

tion that Congressman Wolcott intended in his discussion to limit the burglary portion of the amendment merely to forcible entry.

Moreover, before the 1948 revision, this issue had been settled by the courts, without disagreement. For example, in *Alford* v. *United States,* 113 F. 2d 885, 886–887 (C. A. 10), where the entry into the bank was made by the defendant as a customer, defendant contended that entry under the Act must be accompanied "with force and violence or by putting in fear". The Court of Appeals in rejecting this interpretation said:

> * * * We cannot agree with this construction. The section defines four separate and distinct offenses. The first is an offense in the nature of robbery. The second is an offense in the nature of burglary, entry of a bank with intent to commit a felony or larceny therein, except that forcible entry is not made an element. The third and fourth are offenses in the nature of grand and petit larceny, respectively. Force and violence or putting in fear is an element of robbery, but not of burglary or larceny.

In *Audett* v. *United States,* 132 F. 2d 528, 529 (C. A. 8), certiorari denied, *Audett* v. *Johnston,* 323 U. S. 743, although it does not appear whether the issue was raised there, the court said: "It is true the word 'enter' has a broad range of significance. It may include, as appellant points out, walking in a stream of customers through the front door of the bank in business hours * * *." See also *Steffler* v. *United States,* 143 F. 2d 772 (C. A. 7), certiorari denied, 323 U. S. 746; *Rawls* v. *United States,* 162 F. 2d 798 (C. A. 10).

The continuation of the former phraseology in the revision was thus an acceptance of the interpretation which the words in themselves clearly required.

Petitioner suggests that Congress could not have intended to make entry unaccompanied by force an offense in view of the maximum punishment of twenty years' imprisonment. The short answer is that the twenty year term is a maximum, and not a minimum term. There is, in the present statute, no minimum, and in the former statute the minimum was one year. Congress, having defined the offense of entry in broad terms to cover entries unaccompanied by force as well as forcible entries, also provided a wide range of permissible punishments within which the trial judge could exercise his discretion on the basis of the particular facts. Moreover, it certainly does not offend one's sense of justice to say that Congress has dealt more severely with one who enters a bank having planned to commit a felony than with one who enters innocently and thereafter yields to a sudden temptation.

B. AN ENTRY UNACCOMPANIED BY FORCE DOES NOT MERGE IN THE COMPLETED OFFENSE OF ROBBERY AS A MATTER OF THE CONSTITUTIONAL PROTECTION AGAINST DOUBLE JEOPARDY

Petitioner also suggests that, even if an entry unaccompanied by force could itself be an offense under the statute, when it is part of a completed robbery it necessarily merges into the robbery so that, as a matter of the constitutional protection against double jeopardy, separate punishment cannot be imposed for the entry.

We have already shown, in Point I, that as matter of statutory construction, the offense of burglary as defined in the statute—entry with intent to commit a felony—is separate and distinct from the completed robbery. The cases there discussed in relation to the problem of statutory construction, many of which arose in the context of double jeopardy, are dispositive of this contention as well. If the offenses created by the statute were intended to be distinct, they cannot be held to have merged with each other unless they are, in their definition, so inseparable that one necessarily and inevitably embraces the other. The elements of the offense, and not the evidence adduced in any particular case, govern the application of the prohibition against double jeopardy. *Pinkerton* v. *United States,* 328 U. S. 640, 643–644; *Blockburger* v. *United States,* 284 U. S. 299, 304.

The test generally applied is whether one offense requires proof of elements different from those required for the other. *Gavieres* v. *United States,* 220 U. S. 338, 342; *Carter* v. *McClaughry,* 183 U. S. 365, 395. The elements of the offense of entry with intent to rob, with or without force, are quite different from the elements of the offense of robbery. The first paragraph of 18 U. S. C. 2113 (a), upon which count 1 was based, declares the taking by intimidation of property belonging to a federally-insured bank to be a crime regardless of the place from which the property is taken.[11] Under this charge, proof of entry

[11] Thus, 18 U. S. C. 2113 (a) may be violated without any entry of the bank by robbing an armored car or delivering agent as in the recent Boston Brinks robbery, or a bank messenger as in *White* v. *United States,* 85 F. 2d 268 (C. A. D. C.).

into the bank is not necessary. On the other hand, the offense proscribed in the second paragraph of section 2113 (a), and charged in count 2 of the indictment, is completed when the entry into the bank is effected with intent to commit a felony. The commission of the felony is unnecessary to the completion of the offense. Here, as in *Morgan* v. *Devine,* 237 U. S. 632, although the charges grew out of the same transaction, different evidence was needed to support the different charges. Hence, each could constitutionally be punished as separate and distinct offenses.

It is undoubtedly true that, in most cases of bank robbery, the robbery is preceded by the entry, just as in most cases (and as was the fact in *Albrecht* v. *United States,* 273 U. S. 1) a sale of liquor usually involves possession. Similarly, the charge involved in *United States* v. *Michener,* 331 U. S. 789, of the manufacture of a counterfeiting plate will usually be preceded by possession, there the subject of a separate count. And, as in *Burton* v. *United States,* 202 U. S. 344, receipt of unauthorized compensation is normally preceded by an agreement to receive. This Court has held these normal interrelationships irrelevant so long as the elements of the offense are different. Since the elements of entry with intent to commit a felony are different from the elements of robbery, whether the entry was forcible or not, the two offenses do not merge.

Petitioner suggests possible incongruities in sentencing that may arise, an argument frequently made when the issue involves multiple offenses. To this the

answer is that given by the Court in *Blockburger* v. *United States,* 284 U. S. at p. 305:

> The plain meaning of the provision is that each offense is subject to the penalty prescribed; and if that be too harsh, the remedy must be afforded by act of Congress, not by judicial legislation under the guise of construction. Under the circumstances, so far as disclosed, it is true that the imposition of the full penalty of fine and imprisonment upon each count seems unduly severe; but there may have been other facts and circumstances before the trial court properly influencing the extent of the punishment. In any event, the matter was one for that court, with whose judgment there is no warrant for interference on our part.

CONCLUSION

It is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
FELICIA DUBROVSKY,
Attorneys.

DECEMBER 1956.

APPENDIX A

The 1934 Bank Robbery Bill, as it passed the Senate, provided as follows (78 Cong. Rec. 5738):

Be it enacted, etc., That as used in this act the term "bank" includes any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States.

SEC. 2. Whoever, not being entitled to the possession of property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, takes and carries away, or attempts to take and carry away, such property or money or any other thing of value from any place (1) without the consent of such bank, or (2) with the consent of such bank obtained by the offender by any trick, artifice, fraud, or false or fraudulent representation, with intent to convert such property or money or any other thing of value to his use or to the use of any individual, association, partnership, or corporation, other than such bank, shall be punished by a fine of not more than $5,000 or imprisonment for not more than 10 years, or both.

SEC. 3. Whoever breaks into, or attempts to break into, any building or part thereof used as a place of business by any bank, with intent to commit in such building or part thereof so used any offense defined by this act or any felony under any law of the United States or under any law of the State, District, Territory, or possession where such building is located, shall be fined not more than $5,000 or imprisoned not more than 10 years, or both.

SEC. 4. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than 20 years, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than 5 years nor more than 25 years, or both.

SEC. 5. Whoever, in committing any offense defined in sections 1, 2, or 3 [sic] of this act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death.

SEC. 6. Jurisdiction over any offense defined by this act shall not be reserved exclusively to courts of the United States.

APPENDIX B

The 1934 Bank Robbery Act, as it was finally enacted, provided [48 Stat. 783]:

To provide punishment for certain offenses committed against banks organized or operating under laws of the United States or any member of the Federal Reserve System.

Be it enacted by the Senate and House of Representatives of the United States of America

in Congress assembled, That as used in this Act the term "bank" includes any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States.

SEC. 2. (a) Whoever, by force and violence, or by putting in fear, feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not less than $1,000 nor more than $10,000 or imprisoned not less than five years nor more than twenty-five years, or both.

SEC. 3. Whoever, in committing any offense defined in this Act, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be punished by imprisonment for not less than 10 years, or by death if the verdict of the jury shall so direct.

SEC. 4. Jurisdiction over any offense defined by this Act shall not be reserved exclusively to courts of the United States.

Approved, May 18, 1934.

APPENDIX C

75th Congress
1st Session HOUSE OF REPRESENTATIVES Report No. 732

AMEND THE BANK-ROBBERY STATUTE TO INCLUDE BURGLARY AND LARCENY

April 30, 1937.—Referred to the House Calendar and ordered to be printed

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MR. HEALEY, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H. R. 5900]

The Committee on the Judiciary, to whom was referred the bill (H. R. 5900) to amend the bank-robbery statute to include burglary and larceny, after consideration, report the same favorably to the House with an amendment with the recommendation that, as so amended, the bill do pass.

The committee amendment is as follows:

Page 2, line 2, after the word "any" insert "felony or", and after the word "larceny" strike out "or other depredation."

The Attorney General has recommended the enactment of this proposed legislation which is designed to enlarge the scope of the bank-robbery statute, enacted in 1934, (48 Stat. 783; U. S. C., title 12, sec. 588b) to include larceny and burglary of the banks protected by this statute. These are national banks, member banks of the Federal Reserve System, and banks insured by the Federal Deposit Insurance

Corporation. Your committee concurs in this recommendation.

There is attached hereto and made a part of this report the following communication from the Attorney General to the Speaker of the House in which he explains the desirability of the proposed amendment.

"OFFICE OF THE ATTORNEY GENERAL

Washington, D. C., March 17, 1937.

HON. WILLIAM B. BANKHEAD,
The Speaker, House of Representatives,
Washington, D. C.

My Dear Mr. SPEAKER: The act of May 18, 1934 (48 Stat. 783; U. S. C. title 12, secs. 588a to 588d), penalizes robbery of a national bank or a member bank of the Federal Reserve System. The class of banks protected by this statute was enlarged by section 333 of the act of August 23, 1935 (49 Stat. 720), to include all banks insured by the Federal Deposit Insurance Corporation.

The fact that the statute is limited to robbery and does not include larceny and burglary has led to some incongruous results. A striking instance arose a short time ago, when a man was arrested in a national bank while walking out of the building with $11,000 of the bank's funds on his person. He had managed to gain possession of the money during a momentary absence of one of the employees, without displaying any force or violence and without putting any one in fear—necessary elements of the crime of robbery—and was about to leave the bank when apprehended. As a result, it was not practicable to prosecute him under any Federal statute.

The enclosed bill which has been drafted in this Department proposes to amend subsection (a) of section

2 of the above-mentioned statute so as to include within its prohibitions, the crimes of burglary and larceny of a bank covered by its provisions.

I am informed by the Acting Director of the Bureau of the Budget that this legislation is not in conflict with the program of the President and I recommend its enactment.

Sincerely yours,

HOMER S. CUMMINGS,
Attorney General."

In compliance with clause 2a of rule XIII there is printed below existing law in roman with new matter proposed to be inserted printed in italics:

"(a) Whoever, by force and violence, or by putting in fear feloniously takes, or feloniously attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank; *or whoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny; or whoever shall take or carry away, with intent to steal or purloin, any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank,* shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

U. S. GOVERNMENT PRINTING OFFICE: 1938